



# **Proposed Emergency Amendment to the Sentencing Guidelines**

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**September 2, 2010**

This compilation contains unofficial text of the proposed emergency temporary amendment and issues for comment implementing the statutory changes regarding crack cocaine offenses and directives regarding drug trafficking offenses generally set forth in the Fair Sentencing Act of 2010 (Pub. L. No. 111–220). Official text will appear in an upcoming edition of the Federal Register.

## **PROPOSED AMENDMENT: FAIR SENTENCING ACT OF 2010**

**Synopsis of Proposed Amendment:** *The Fair Sentencing Act of 2010, Pub. L. 111–220 (the "Act"), was signed into law on August 3, 2010. The Act reduces statutory penalties for cocaine base (crack cocaine) offenses and eliminates the mandatory minimum sentence for simple possession of crack cocaine. The Act also contains directives to the Commission to review and amend the sentencing guidelines to account for certain aggravating and mitigating circumstances in drug trafficking cases.*

*Section 8 of the Act invokes the Commission's emergency, temporary amendment authority under section 21(a) of the Sentencing Act of 1987 (28 U.S.C. § 994 note) and directs the Commission to promulgate within 90 days — *i.e.*, not later than November 1, 2010 — the amendments to the Guidelines Manual provided for by the Act. It provides in full as follows:*

### **SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.**

*The United States Sentencing Commission shall--*

- (1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and*
- (2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.*

*Section 21(a) of the Sentencing Act of 1987 provides in full as follows:*

### **SEC. 21. EMERGENCY GUIDELINES PROMULGATION AUTHORITY.**

*(a) In General.—In the case of—*

- (1) an invalidated sentencing guideline;*
- (2) the creation of a new offense or amendment of an existing offense; or*
- (3) any other reason relating to the application of a previously established sentencing guideline, and determined by the United States Sentencing Commission to be urgent and compelling;*

*the Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of title 28 and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System a temporary guideline or amendment to an existing guideline, to remain in effect until and during the pendency of the*

*next report to Congress under section 994(p) of title 28, United States Code.*

*Any temporary amendment promulgated by the Commission under the section 21(a) authority will expire not later than November 1, 2011. See section 21(a); 28 U.S.C. § 994(p). The Commission will continue work on the issues raised by the Act during the regular amendment cycle ending May 1, 2011, with a view to re-promulgating any temporary amendment as a permanent amendment (in its original form, or with revisions) under 28 U.S.C. § 994(p).*

*The proposed amendment and issues for comment address the issues arising under the Act in the following manner:*

**(A) Changes to Statutory Terms of Imprisonment for Crack Cocaine**

**Issue for Comment:**

*1. Federal drug laws establish three tiers of penalties for manufacturing and trafficking in cocaine, each based on the amount of cocaine involved. See 21 U.S.C. §§ 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3). For smaller quantities, the maximum term of imprisonment is 20 years, and there is no mandatory minimum term of imprisonment. If the amount of cocaine involved reaches a specified quantity, however, the maximum term increases to 40 years, and a mandatory minimum term of 5 years applies. If the amount of cocaine reaches ten times that specified quantity, the maximum term is life, and a mandatory minimum term of 10 years applies.*

*Section 2 of the Act amended these laws to raise the specified quantities of crack cocaine associated with these two higher tiers of penalties. Before the Act, the 5-year mandatory minimum applied to offenses involving 5 grams (or more) of crack cocaine, and the 10-year mandatory minimum applied to offenses involving 50 grams (or more) of crack cocaine. Section 2 of the Act raised these quantities to 28 grams and 280 grams, respectively.*

*The Commission requests comment on what temporary amendments to the Guidelines Manual it should promulgate in response to the statutory changes made by section 2 of the Act. In particular, the Commission requests comment on what amendments should be made to the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). When Congress has provided statutory mandatory minimum sentences based on drug quantity, the Commission has generally responded by incorporating the statutory mandatory minimum sentences into the Drug Quantity Table and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. The drug quantity thresholds in the Drug Quantity Table have generally been set so as to provide base offense levels corresponding to guideline ranges that are above the statutory mandatory minimum penalties.*

*Until 2007, the drug quantity thresholds for crack cocaine followed the same principle. Accordingly, offenses involving 5 grams or more of crack cocaine were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the 5-year statutory minimum for such offenses by at least three months). Similarly, offenses involving 50 grams or more of crack cocaine were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal*

*History Category I (a guideline range that exceeds the 10-year statutory minimum for such offenses by at least 1 month). In Amendment 706, the Commission amended the Drug Quantity Table for crack cocaine, reducing the base offense levels for these quantities to level 24 and level 30, respectively, and extrapolating upward and downward for other crack cocaine quantities. See USSG App. C, Amendment 706 (effective November 1, 2007). Base offense levels 24 and 30 each correspond to a guideline range for a defendant in Criminal History Category I that includes the statutory mandatory minimum penalty. For base offense level 24, the guideline range is 51-63 months; for base offense level 30, the guideline range is 97-121 months. The Commission also amended the commentary to §2D1.1 to revise the manner in which combined offense levels are determined in cases involving both crack cocaine and one or more other controlled substances. See USSG App. C, Amendment 715 (effective May 1, 2008).*

*Given the statutory changes made by section 2 of the Act, how should the Commission revise the Drug Quantity Table for offenses involving crack cocaine?*

*In particular, should the base offense levels for crack cocaine again be set so that the statutory minimum penalties correspond to levels 26 and 32, using the new drug quantities established by the Act (the "level 26 option")? Or should the base offense levels for crack cocaine continue to be set so that the statutory minimum penalties correspond to levels 24 and 30, using the new drug quantities established by the Act (the "level 24 option")? A comparison of the base offense levels ("BOL") and quantities for these options is as follows:*

<u>BOL</u>	<u>Quantity Under Level 26 Option</u>	<u>Quantity Under Level 24 Option</u>
38	8.4 KG or more	25.2 KG or more
36	At least 2.8 KG but less than 8.4 KG	At least 8.4 KG but less than 25.2 KG
34	At least 840 G but less than 2.8 KG	At least 2.8 KG but less than 8.4 KG
32	At least 280 G but less than 840 G	At least 840 G but less than 2.8 KG
30	At least 196 G but less than 280 G	At least 280 G but less than 840 G
28	At least 112 G but less than 196 G	At least 196 G but less than 280 G
26	At least 28 G but less than 112 G	At least 112 G but less than 196 G
24	At least 22.4 G but less than 28 G	At least 28 G but less than 112 G
22	At least 16.8 G but less than 22.4 G	At least 22.4 G but less than 28 G
20	At least 11.2 G but less than 16.8 G	At least 16.8 G but less than 22.4 G
18	At least 5.6 G but less than 11.2 G	At least 11.2 G but less than 16.8 G
16	At least 2.8 G but less than 5.6 G	At least 5.6 G but less than 11.2 G
14	At least 1.4 G but less than 2.8 G	At least 2.8 G but less than 5.6 G
12	Less than 1.4 G	Less than 2.8 G

*Whichever option is adopted, conforming changes to the commentary to §2D1.1 will need to be made to revise the manner in which combined offense levels are determined in cases involving crack cocaine and one or more other controlled substances. Under either option, 1 gram of crack cocaine would be equivalent to 3,571 grams of marijuana. However, if the level 26 option is adopted, the combined offense level in such a case would be determined under Application Note 10 in the same manner as for any other case involving more than one controlled substance, i.e., Application Note 10(D) would not apply. If the level 24 option is adopted, in contrast, Application Note 10(D) would continue to apply, except that Application Note 10(D)(ii)(I) would be amended to read "the offense involved 25.2 kg or more, or less than 1.4 g, of cocaine base; or", and the examples in Application Note 10(D)(iii) would be revised.*

**(B) Elimination of Mandatory Minimum for Simple Possession of Crack Cocaine**

**Synopsis of Proposed Amendment:** *This part of the proposed amendment responds to section 3 of the Act, which amended 21 U.S.C. § 844(a) to eliminate the 5-year mandatory minimum term of imprisonment (and 20-year statutory maximum) for simple possession of more than 5 grams of crack cocaine (or, for certain repeat offenders, more than 1 gram of crack cocaine). Accordingly, the statutory penalty for simple possession of crack cocaine is now the same as for simple possession of most other controlled substances: for a first offender, a maximum term of imprisonment of one year; for repeat offenders, maximum terms of 2 years or 3 years, and minimum terms of 15 days or 90 days, depending on the prior convictions. See 21 U.S.C. § 844(a).*

*Offenses under section 844(a) are referenced in Appendix A (Statutory Index) to §2D2.1 (Unlawful Possession; Attempt or Conspiracy). Section 2D2.1 contains a cross reference at subsection (b)(1) that was established by the Commission in 1989 to address the statutory minimum in section 844(a). See USSG App. C, Amendment 304 (effective November 1, 1989). Under the cross reference, an offender who possessed more than 5 grams of crack cocaine is sentenced under the drug trafficking guideline, §2D1.1. To reflect the elimination of this statutory minimum, the proposed amendment deletes as obsolete the cross reference at §2D2.1(b)(1). Conforming changes to the commentary are also made.*

**Proposed Amendment:**

**§2D2.1. Unlawful Possession; Attempt or Conspiracy**

(a) Base Offense Level:

- (1) **8**, if the substance is heroin or any Schedule I or II opiate, an analogue of these, or cocaine base; or
- (2) **6**, if the substance is cocaine, flunitrazepam, LSD, or PCP; or
- (3) **4**, if the substance is any other controlled substance or a list I chemical.

(b) Cross References

- ~~(1) If the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) as if the defendant had been convicted of possession of that mixture or substance with intent to distribute.~~
- ~~(2)~~ If the offense involved possession of a controlled substance in a prison, correctional facility, or detention facility, apply §2P1.2 (Providing or Possessing Contraband in Prison).

Commentary

Statutory Provision: 21 U.S.C. § 844(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant's own consumption. Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.

Background: Mandatory (statutory) minimum penalties for several categories of cases, ranging from fifteen days' to five years' imprisonment, are set forth in 21 U.S.C. § 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. See §5G1.1(b). Note, however, that 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

~~Section 2D2.1(b)(1) provides a cross reference to §2D1.1 for possession of more than five grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty under 21 U.S.C. § 844(a). Other cases for which enhanced penalties are provided under 21 U.S.C. § 844(a) (e.g., for a person with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base, for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with §5G1.1(b).~~

**(C) Enhancements and Adjustments**

**Synopsis of Proposed Amendment:** This part of the proposed amendment responds to sections 5, 6, and 7 of the Act, which contain directives to the Commission to provide certain enhancements and adjustments for drug trafficking offenses.

Violence Enhancement

First, this part of the proposed amendment responds to section 5 of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense."

This part of the proposed amendment implements this directive by amending §2D1.1 to provide a new specific offense characteristic at subsection (b)(2) that provides an enhancement of [2][4][6] levels if violence as described in the directive was involved. A conforming amendment to Application Note 3 is also made.

Bribery Enhancement

Second, this part of the proposed amendment responds to section 6(1) of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if . . . the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense."

*This part of the proposed amendment implements this directive by amending §2D1.1 to establish a new specific offense characteristic at subsection (b)(11) that provides an enhancement of [2][4] levels if the defendant [was convicted of bribing or attempting to bribe][bribed or attempted to bribe] a law enforcement officer to facilitate the commission of the offense.*

*Drug Establishment Enhancement*

*Third, this part of the proposed amendment responds to section 6(2) of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if . . . the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856)."*

*This part of the proposed amendment implements this directive by amending §2D1.1 to establish a new specific offense characteristic at subsection (b)(12) that provides an enhancement of [2][4] levels if the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as described in 21 U.S.C. § 856.*

*Enhancement Based on "Super-Aggravating" Factors*

*Fourth, this part of the proposed amendment responds to section 6(3) of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if . . . (A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and (B) the offense involved 1 or more of the following super-aggravating factors:"*

- (i) The defendant--
  - (I) used another person to purchase, sell, transport, or store controlled substances;*
  - (II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and*
  - (III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction.**
- (ii) The defendant--
  - (I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;*
  - (II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;**

- (III) *knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or*
- (IV) *knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.*
- (iii) *The defendant was involved in the importation into the United States of a controlled substance.*
- (iv) *The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.*
- (v) *The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood.*

*This part of the proposed amendment implements this directive by creating a new enhancement of [2][4] levels in subsection (b)(14) of §2D1.1 if the defendant receives an adjustment under §3B1.1 and the offense involved one or more of the factors described in the directive.*

*Downward Adjustment Based on Certain Mitigating Factors*

*Fifth, this part of the proposed amendment responds to section 7(2) of the Act, which directs the Commission to "review and amend the Federal sentencing guidelines and policy statements to ensure that . . . there is an additional reduction of 2 offense levels if the defendant--"*

- (A) *otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;*
- (B) *was to receive no monetary compensation from the illegal transaction; and*
- (C) *was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense.*

*This part of the proposed amendment implements this directive by creating a new downward adjustment of 2 levels in subsection (b)(15) of §2D1.1 if the defendant receives an adjustment under §3B1.2(a) and the other factors described in the directive apply.*

*Technical and Conforming Changes*

*Finally, to reflect the renumbering of specific offense characteristics in §2D1.1(b) by this part of the*



*proposed amendment, this part of the proposed amendment makes technical and conforming changes to the commentary to §2D1.1 and to §2D1.14 (Narco-Terrorism).*

*Issues for comment are also included.*

**Proposed Amendment:**

**§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

\* \* \*

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.
- (2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by [2][4][6] levels.

**[renumber existing (2)-(9) as (3)-(10)]**

- (11) If the defendant [was convicted of bribing or attempting to bribe][bribed or attempted to bribe] a law enforcement officer to facilitate the commission of the offense, increase by [2][4] levels.
- (12) If the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as described in 21 U.S.C. § 856, increase by [2][4] levels.
- (13) (Apply the greatest):

\* \* \*

- (14) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:
  - (A) (i) the defendant used impulse, fear, friendship, affection, or some combination thereof to involve another individual in the purchase, sale, transport, or storage of controlled substances; and (ii) the individual (I) was to receive little or no compensation from that purchase, sale, transport, or storage of controlled substances and (II) had minimal knowledge of [the scope and structure of] the enterprise;
  - (B) the defendant knowingly (i) distributed a controlled substance to an individual under the age of 18 years, an individual over the age

of 64 years, a pregnant individual, an individual who was unusually vulnerable due to physical or mental condition, or an individual who was particularly susceptible to criminal conduct, or (ii) involved such an individual in the offense;

- (C) the defendant was involved in the importation of a controlled substance;
- (D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice;
- (E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood;

increase by [2][4] levels.

(15) If the defendant receives an adjustment under subsection (a) of §3B1.2 (Mitigating Role) and the offense involved all of the following factors:

- (A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;
- (B) the defendant was to receive no monetary compensation from the offense; and
- (C) the defendant had minimal knowledge of [the scope and structure of] the enterprise,

decrease by 2 levels.

(+16) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

3. Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession in subsection (b)(1) reflects the increased danger of violence when drug traffickers possess weapons. ~~The adjustment~~ Subsection (b)(1) should be applied if the weapon was present, unless it is clearly improbable that the weapon

was connected with the offense. For example, ~~the enhancement subsection (b)(1) would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1, see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(c)(1), and 2D2.1(b)(1). Although the enhancements for weapon possession in subsection (b)(1) and violence in subsection (b)(2) may be triggered by the same conduct (such as where the defendant uses the possessed weapon to make a credible threat to use violence), they are to be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. See §1B1.1 (Application Instructions), Application Note 4(A).~~

\* \* \*

8. Interaction with §3B1.3.—A defendant who used special skills in the commission of the offense may be subject to an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. Additionally, an enhancement under §3B1.3 ordinarily would apply in a case in which the defendant used his or her position as a coach to influence an athlete to use an anabolic steroid.

Note, however, that if an adjustment from subsection (b)(~~23~~)(C) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

\* \* \*

18. If the offense involved importation of amphetamine or methamphetamine, and an adjustment from subsection (b)(~~23~~) applies, do not apply subsection (b)(~~45~~).
19. Hazardous or Toxic Substances.—Subsection (b)(~~13~~)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(~~13~~)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).

20. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—

(A) Factors to Consider.—In determining, for purposes of subsection (b)(~~13~~)(C)(ii) or (D), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:

\* \* \*

(B) Definitions.—For purposes of subsection (b)(~~13~~)(D):

\* \* \*

21. Applicability of Subsection (b)(~~16~~).—The applicability of subsection (b)(~~16~~) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(~~16~~) applies.

\* \* \*

23. Application of Subsection (b)(~~67~~).—For purposes of subsection (b)(~~67~~), "mass-marketing by means of an interactive computer service" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(~~67~~) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "Interactive computer service", for purposes of subsection (b)(~~67~~) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

\* \* \*

25. Application of Subsection (b)(~~78~~).—For purposes of subsection (b)(~~78~~), "masking agent" means a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual's body.

26. Application of Subsection (b)(~~89~~).—For purposes of subsection (b)(~~89~~), "athlete" means an individual who participates in an athletic activity conducted by (i) an intercollegiate athletic association or interscholastic athletic association; (ii) a professional athletic association; or (iii) an amateur athletic organization.

\* \* \*

Background:

\* \* \*

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.

~~Specific Offense Characteristic~~ Subsection (b)(23) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

\* \* \*

Subsection (b)(11) implements the directive to the Commission in section 6(1) of Public Law 111-220.

Subsection (b)(12) implements the directive to the Commission in section 6(2) of Public Law 111-220.

Subsection (b)(13)(A) implements the instruction to the Commission in section 303 of Public Law 103-237.

Subsections (b)(13)(C)(ii) and (D) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106-310.

Subsection (b)(14) implements the directive to the Commission in section 6(1) of Public Law 111-220.

Subsection (b)(15) implements the directive to the Commission in section 7(2) of Public Law 111-220.

\* \* \*

#### **§2D1.14. Narco-Terrorism**

(a) Base Offense Level:

- (1) The offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applicable to the underlying offense, except that §2D1.1(a)(5)(A), (a)(5)(B), and (b)(16) shall not apply.

\* \* \*

#### **Issues for Comment:**

1. In the proposed new violence enhancement in subsection (b)(2) of §2D1.1, should the Commission provide a single level of enhancement for any conduct covered by the violence enhancement, or should the Commission distinguish among the different categories of conduct (use of violence; credible threat to use violence; directing others to use violence) by assigning different levels of enhancement to each?

2. The proposed amendment would amend Application Note 3 to §2D1.1 to provide that the enhancements for weapon possession in subsection (b)(1) and violence in subsection (b)(2) are to be applied cumulatively. Should the Commission instead provide that the enhancements are not to be applied cumulatively?

3. The Guidelines Manual uses the term "violence" in several provisions, e.g., §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) (the "safety valve" provision), without defining the term. Should the term "violence" be defined for purposes of the new violence enhancement in subsection (b)(2)? If so, what should the definition be? How, if at all, should such a definition interact with the other provisions in the Manual where the term is not defined?
4. The proposed new bribery enhancement in §2D1.1(b)(11) may interact with other provisions in the Guidelines Manual, such as §3C1.1 (Obstructing or Impeding the Administration of Justice). How should the new bribery enhancement interact with such other provisions? In particular, should they be applied cumulatively, or should they not be applied cumulatively?
5. The proposed new enhancement in §2D1.1(b)(12) would apply if the defendant "maintained an establishment for the manufacture or distribution of a controlled substance, as described in 21 U.S.C. § 856." Should this enhancement apply more broadly, e.g., if the defendant "committed an offense described in 21 U.S.C. § 856"? How should this proposed new enhancement in subsection (b)(12) interact with §2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy)? In particular, should the Commission raise the alternative base offense level 26 in §2D1.8 to [28][30]?
6. As an alternative to establishing new specific offense characteristics at subsections (b)(14) and (15) of §2D1.1, should the Commission instead implement these directives in Chapter Three? In particular, should the Commission amend §§3B1.1 and 3B1.2, or establish new Chapter Three guidelines, to provide the adjustments required by the directives?
7. For the proposed new specific offense characteristic in §2D1.1(b)(14), should the Commission distinguish among the different factors described by the directive (e.g., the factors set forth in subparagraphs (A) through (E) of the proposed new §2D1.1(b)(14)) by assigning different levels to each? For example, should the most egregious factor be assigned an adjustment of [6] levels, and other factors assigned adjustments of [4] or [2] levels? If more than one factor is present, should that have a cumulative effect, warranting a higher total adjustment for that defendant? As an alternative, should the Commission provide an upward departure provision for cases in which more than one factor is present?
8. The proposed new specific offense characteristic in §2D1.1(b)(14) may interact with other provisions in the Guidelines Manual, such as §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), §3B1.4 (Using a Minor to Commit a Crime), §3C1.1 (Obstructing or Impeding the Administration of Justice), and §4B1.3 (Criminal Livelihood). How should the new specific offense characteristic in subsection (b)(14) interact with such other provisions? In particular, should they be applied cumulatively, or should they not be applied cumulatively?
9. The proposed new specific offense characteristic in §2D1.1(b)(14) and the proposed new specific offense characteristics in §2D1.1 for bribery (see Part C of this proposed amendment) and maintenance of a drug establishment (see Part D of this proposed amendment) all respond to section 6 of the Fair Sentencing Act of 2010. How should these provisions interact with each other? In particular, should they be applied cumulatively, or should they not be applied cumulatively?
10. This part of the proposed amendment establishes several new specific offense characteristics in §2D1.1. What, if any, changes should the Commission make to other Chapter Two offense guidelines involving drug trafficking to ensure consistency and proportionality? Many such guidelines refer to §2D1.1 in determining

the offense level, but not in all cases. For example, if the base offense level is determined under subsection (a)(3) or (a)(4) of §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), or under subsection (a)(2) of §2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy), or under §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), the new specific offense characteristics would not apply. Should the Commission establish similar specific offense characteristics in §2D1.2, §2D1.5, and §2D1.11?

11. What other changes, if any, should the Commission make to the Guidelines Manual under the emergency authority provided by section 8 of the Act?

**(D) Maximum Base Offense Level for Minimal Role ("Minimal Role Cap")**

**Synopsis of Proposed Amendment:** *This part of the proposed amendment responds to section 7(1) of the Act, which contains a directive to the Commission to "review and amend the Federal sentencing guidelines and policy statements to ensure that . . . if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32."*

*This part of the proposed amendment implements the directive by adding a new sentence to the end of §2D1.1(a)(5) (the so-called "mitigating role cap"), to reflect the "minimal role cap" of level 32 required by the directive.*

**Proposed Amendment:**

**§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

(a) Base Offense Level (Apply the greatest):

\* \* \*

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels. If the resulting offense level is greater than level 32 and the defendant receives an adjustment under subsection (a) of §3B1.2, decrease to level 32.

\* \* \*